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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 717

LEWES DAIRY, INC., PETITIONER

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE, AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court in *United States* v. *Lewes Dairy, Inc.* (R. 32a)[1] is reported at 214 F. Supp. 616;[2] its opinion in *Lewes Dairy, Inc.* v. *Freeman* (R. 221a) is not reported. The opinion of the court of appeals covering both cases (Pet. App. 1a) is reported at 337 F. 2d 827.

[1] "R" refers to the separately bound appendix to the Government's brief filed in the Court of Appeals, nine copies of which petitioner has filed in this Court.

[2] *Sub nom. United States* v. *Ott, et al.*

JURISDICTION

The judgments of the court of appeals were entered on October 6, 1964 (Pet. App. 11a, 12a). The petition for a writ of certiorari was filed on November 24, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a district court action under 7 U.S.C. 608c(15) to determine whether a ruling of the Secretary of Agriculture made upon the record of an administrative proceeding before him was "in accordance with law," petitioner could challenge the validity of the Secretary's ruling upon a ground which it had not developed in the administrative proceedings before that official.

STATUTE INVOLVED

The Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 *et seq.*, provides in pertinent part:

7 U.S.C. 608c(5)(G):

> No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area of the United States.

7 U.S.C. 608c(15):

> (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in ac-

cordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection) shall abate whenever a final decree has been rendered in proceedings between the same parties, and

covering the same subject matter, instituted pursuant to this subsection.

STATEMENT

Pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, the Secretary of Agriculture promulgated an Order regulating the marketing of milk in the major portion of the State of Maryland. Under Milk Marketing Order No. 16 (formerly No. 127, R. 112a) companies selling substantial amounts of fluid milk in the "Upper Chesapeake Bay Milk Marketing Area" must pay specified minimum prices for all their raw milk supplies purchased from farmers. For practical regulatory reasons not challenged here, those minimum price payments are channeled through a "producer-settlement fund," the mechanics of which were explained and approved generally by this Court in *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, as they were, with particular regard to the Marketing Order here in question, by the Fourth Circuit in *United States* v. *Mills*, 315 F. 2d 828, certiorari denied *sub nom. Willow Farms Dairy, Inc.* v. *Freeman*, 374 U.S. 832.

Petitioner is a milk company with a plant located in Delaware. However, it does a substantial portion of its business in the "Upper Chesapeake Bay Milk Marketing Area" and is subject to full regulation under the Order No. 16. Petitioner, however, refused to make the prescribed payments into the producer-settlement fund. Pursuant to 7 U.S.C. 608a(6), the government then obtained a court order to enforce petitioner's compliance. *United States* v. *Lewes Dairy, Inc.*, R. 32a.

In a separate proceeding, petitioner, together with the Mills Dairy Products Company of Maryland and others, filed a joint petition with the Secretary of Agriculture under 7 U.S.C. 608c(15)(A) in which it challenged the validity of the Marketing Order (R. 148a). After administrative hearings as provided in the Act, the Secretary rendered a tentative decision (R. 173a), and on June 14, 1961, a final decision (R. 210a), rejecting the joint challenge to the Marketing Order.

The milk companies sought judicial review of the Secretary's ruling in the judicial district where each had its principal place of business, as provided in 7 U.S.C. 608c(15)(B). Thus, petitioner brought suit in the United States District Court for the District of Delaware (*Lewes Dairy, Inc., et al.* v. *Freeman,* R. 213a), while the Mills Dairy Products Company commenced a separate action in the federal court in Maryland. The Maryland litigation was heard and decided first. On March 11, 1963, the Court of Appeals for the Fourth Circuit reversed a lower court decision and upheld Milk Marketing Order No. 16 as valid. *United States* v. *Mills,* 315 F. 2d 828, certiorari denied *sub nom. Willow Farms Dairy, Inc.* v. *Freeman,* 374 U.S. 832.

Thereafter, on May 20, 1963, Lewes Dairy, Inc., moved for summary judgment in its Delaware suit (R. 48a). Although it purported not to be abandoning the contentions it had jointly raised with Mills Dairy before the Secretary, petitioner rested its motion for summary judgment on a ground which had not been developed before the Secretary in the prior

administrative proceedings. Because it made a substantial portion of its milk sales within the Marketing Area, the Marketing Order subjected Lewes Dairy, Inc. to "full regulation." It was therefore required to pay farmers the minimum prices established under the Order on all its raw milk purchases from them, even though petitioner disposed of some of its milk in Delaware, outside the Marketing Area. In its motion for summary judgment, Lewes Dairy asserted that this requirement placed it at an economic disadvantage with those of its competitors who did business only in Delaware. Lewes alleged that those competitors are not subject to regulation and could purchase their milk supplies without paying the minimum prices established by the Marketing Order as Lewes was required to do. Lewes Dairy urged that "full regulation" as applied to it constituted a "trade barrier," impermissible under 7 U.S.C. 608c(5)(G) as interpreted by this Court in *Lehigh Valley Co-op.* v. *United States,* 370 U.S. 76. *Lehigh Valley* was decided by this Court on June 4, 1962, almost one full year *after* the final decision of the Secretary under review in the instant case.

The Secretary opposed Lewes Dairy's motion for summary judgment on the ground, *inter alia,* that the company had not raised the "trade barrier" issue in the administrative proceedings and that therefore he had never passed on the question as contemplated by the Agricultural Marketing Agreement Act, 7 U.S.C. 608c(15). Nevertheless, the district court ruled (R. 223a):

> Whether or not the question of the Order's imposition of a trade barrier was raised before or decided in the administrative proceeding below, justice requires that this question be decided in this review proceeding without remand for further administrative hearings.

The district court went on to grant summary judgment to Lewes Dairy, holding that "full regulation" of Lewes Dairy constituted a "trade barrier" which, in light of *Lehigh Valley Co-op.* v. *United States, supra,* was not permissible (R. 223a).

After the district court rejected the Secretary's motion to remand the cause to that official for his consideration of the "trade barrier" issue (R. 226a, 233a), the Secretary appealed to the United States Court of Appeals for the Third Circuit.[3] On October 6, 1964, relying upon this Court's decision in *United States* v. *Ruzicka,* 329 U.S. 287, the court of appeals ruled (emphasis added) (Pet. App. 3a–4a):

> [*T*]*he Secretary preliminarily asserts that the* [*trade barrier*] *issue was not developed in the administrative proceeding and therefore contends that the cause should be remanded for further administrative proceedings,* unless, of course, this Court should determine as a matter of law the Milk Marketing Order is valid as applied. In this connection the Secretary contends that the District Court exceeded its authority in finding facts and in supplanting the Secretary in the exercise of functions initially committed to him.

[3] The district court stayed the effect of its decision pending appeal (R. 46a).

> * * * [*W*]*e are in agreement with the preliminary assertion of the Secretary,* * * *.

In accordance with that opinion, the court entered judgments reversing the decisions of the district court and ordered the cause remanded for further administrative proceedings (Pet. App. 11a–12a).[4]

ARGUMENT

Petitioner seeks to challenge the validity of provisions contained in a Federal Milk Marketing Order. The basis of the challenge is such that, if sustained, it is very likely to have serious, adverse consequences on the nation-wide program of federal economic regulation pertaining to the dairy industry. The court of appeals reversed a district court judgment in petitioner's favor and remanded the cause to the Secretary of Agriculture for further administrative proceedings. The appellate court so ruled because petitioner had failed to develop before the Secretary the ground of challenge to the Marketing Order which it later asserted in the district court. The decision is plainly correct and there is no occasion for review by this Court at the present stage of the proceedings.

1. The court of appeals did not pass on the merits of petitioner's challenge to the Secretary's Marketing

[4] Pursuant to stipulation of the parties, the court of appeals stayed its mandates in both cases pending this Court's resolution of these proceedings on certiorari. In the interim, petitioner is making the payments currently due from it to the producer-settlement fund into the registry of the district court *pendente lite*, and is also paying into the registry its back due obligations under the Marketing Order in accordance with a schedule provided in the stipulation (Pet. App. 13a–15a).

Order. Rather, it remanded the cause to permit petitioner to seek a ruling on his complaint in the first instance from the Secretary of Agriculture, in accordance with the express procedure established by Congress in the Agricultural Marketing Agreement Act, 7 U.S.C. 608c(15)(A). If petitioner is not satisfied with the administrative decision of that official, judicial review will then be available to test whether the Secretary's ruling is "in accordance with law," 7 U.S.C. 608c(15)(B). The present interlocutory posture of the proceeding is sufficient reason in itself for denial of the petition for a writ of certiorari. *Hamilton Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 257–258.

2. Moreover, the court's remand of this cause to the Secretary for further administrative proceedings was entirely correct. In *United States* v. *Ruzicka*, 329 U.S. 287, this Court held that a regulated milk company may not challenge the validity of a Marketing Order in court without first having exhausted the administrative remedies available to it before the Secretary of Agriculture under 7 U.S.C. 608c(15)(A). In explaining this exhaustion requirement, the Court stated (329 U.S. at 294):

> It is suggested that Congress did not authorize a district court to enforce an order not "in accordance with law." The short answer to this rather dialectic point is that whether such an order is or is not in accordance with law is not a question that brings its own immediate answer, or even an answer which it is the familiar, everyday business of courts to find. Congress has provided a special procedure for ascer-

> taining whether such an order is or is not in accordance with law. The questions are not, or may not be, abstract questions of law. Even when they are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the milk industry. And so Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture. It is on the basis of this ruling, and of the elucidation which he would presumably give to his ruling, that resort may be had to the courts. * * *

In ordering the instant cause remanded to the Secretary, the court of appeals relied expressly upon *Ruzicka* (Pet. App. 8a–9a), and, at the same time, followed the uniform practice of the Circuits. *United States* v. *Yadkin Valley Dairy Co-op.*, 315 F. 2d 867 (C.A. 4); *Willow Farms Dairy, Inc.* v. *Benson*, 276 F. 2d 856 (C.A. 4); *United States* v. *Ideal Farms, Inc.*, 262 F. 2d 334 (C.A. 3); *Benson* v. *Schofield*, 236 F. 2d 719 (C.A.D.C.); *United States* v. *Turner Dairy Co.*, 166 F. 2d 1 (C.A. 7); *La Verne Co-op. Citrus Association* v. *United States*, 143 F. 2d 415 (C.A. 9). Any other course would have been erroneous. As the Court explained in *Unemployment Compensation Comm'n* v. *Aragon*, 329 U.S. 143, 155:

> The responsibility of applying the statutory provisions to the facts of the particular case was given in the first instance to the Commission. A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore

> presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action. * * *

Further, because the effect of "full regulation" as it relates to this petitioner was not developed in the administrative proceedings, the Secretary had no occasion to explain the reason for instituting such a requirement. Since it was not open to counsel in the court of appeals to support the Secretary's decision with their own "*post hoc* rationalizations," *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168; *Securities and Exchange Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 196, remand was necessary not only to permit the Secretary to determine on the basis of his expertise whether "full regulation" of this petitioner is warranted, but also to obtain "the elucidation which he would presumably give to his ruling." *United States* v. *Ruzicka*, 329 U.S. 287, 294.

3. Remand might be inappropriate if petitioner's objections were so clearly meritorious that the outcome of further proceedings would be beyond doubt. But that is not the case. Petitioner's principal claim in this Court is that the decision of the court below conflicts with *Lehigh Valley Co-op.* v. *United States*, 370 U.S. 76.[5] However, it is apparent from the face of the *Lehigh* decision itself that no such conflict exists.

[5] The *Lehigh* decision was rendered *after* the Secretary's decision in these proceedings. This, of course, explains why the "trade barrier" issue, articulated so clearly in the petition and in the courts below, was not previously developed by petitioner in the administrative proceedings.

Lehigh Valley was concerned with an entirely distinct problem, to wit: whether the Secretary could require certain milk companies, not otherwise regulated by a Milk Marketing Order, to make "compensatory payments" into the producer-settlement fund established under the Order as a condition of doing business in a regulated Milk Marketing Area. The Court held that, under the conditions present in the *Lehigh* case, those compensatory payments constituted a "trade barrier" impermissible under 7 U.S.C. 608c(5)(G). No issue of compensatory payments is involved in this case. Rather, petitioner here challenges the authority of the Secretary to set minimum prices which it must pay for all its raw milk purchases from farmers when some of petitioner's sales are made outside the Marketing Area. Such "full regulation" is uniformly imposed on all companies doing a substantial business in the regulated market. As the Court itself recognized in *Lehigh Valley* (370 U.S. at 99):

> *Whether full regulation of the petitioners would be permissible under the Act is a question which we need not reach in this case.* If the Secretary chooses to impose such regulation as a consequence of a handler's introducing any milk into a marketing area, *the validity of such a provision would involve considerations different from those now before us.* [Emphasis supplied.] [6]

[6] *Polar Co.* v. *Andrews*, 375 U.S. 361, also cited by petitioner (Pet. 11), was concerned only with the regulation of milk marketing undertaken by the State of Florida. Federal marketing regulations were not involved and neither the United States nor the Secretary of Agriculture was party to the *Polar Co.* litigation.

Moreover, the only case to pass directly on this long-established regulatory practice held such "full regulation" entirely permissible under the Act. *Titusville Dairy Products Co.* v. *Brannan,* 176 F. 2d 332 (C.A. 3), certiorari denied, 338 U.S. 905. Thus no conflict exists which calls for resolution by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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